INTERIOR BOARD OF INDIAN APPEALS

State of Kansas v. Acting Southern Plains Regional Director, Bureau of Indian Affairs

36 IBIA 152 (05/30/2001)

STATE OF KANSAS, Appellant	:	Order Vacating Decision and Remanding Case
v.	:	
	:	Docket No. IBIA 00-86-A
ACTING SOUTHERN PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	May 30, 2001

This is an appeal from a May 1, 2000, decision of the Acting Southern Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to take a tract of land in Jackson County, Kansas, into trust for the Prairie Band of Potawatomi Indians (Tribe). For the reasons discussed below, the Board vacates the Regional Director's decision and remands this matter to him for further consideration.

The Tribe purchased the tract at issue in 1997. On January 14, 1999, by Resolution PBP 99-18, the Tribe asked BIA to take the tract into trust, stating that it contained 4.3 acres, was located adjacent to the Tribe's present reservation, and was to be used for the Tribe's Law Enforcement Center and for "such additional tribal government or other functions as may arise." 1/

On February 1, 1999, the Acting Superintendent, Horton Agency, BIA, sent notice of the proposed trust acquisition to the Governor of Kansas and the Treasurer of Jackson County, Kansas. The notice letters invited comments on the proposed acquisition and sought certain information concerning the property, i.e., information as to property taxes, special assessments, governmental services, and zoning. Responses were submitted by Appellant, through its Secretary of Revenue, and by Jackson County, through its County Appraiser.

1/ The tribal resolution described the land as follows:

"Beginning at a point 691 feet North of the Southwest Corner of the Northwest Quarter of Section 22, Township 8 South, Range 15 East[, 6th P.M.], thence East 608 feet, thence North 321.14 feet, thence West 608.0 feet to the West line of the Northwest Quarter, thence South along the West line 321.14 feet to the point of beginning, Jackson County, Kansas."

Appellant objected to the acquisition, stating that the State and local governments would lose property tax revenue and would receive no compensation for water and highway services they would be required to provide to the tract. Appellant urged that the Tribe be required to use its existing reservation lands for its stated tribal governmental purposes.

The Jackson County Appraiser stated that the 1998 property taxes on the land were $7.66 but that taxes for 1999 were estimated to be $3755, reflecting construction of the Law Enforcement Center. He stated that the present use of the land for a Law Enforcement Center was consistent with County zoning. He indicated, however, that the County opposed trust acquisition because the land is not within the Tribe's reservation. He stated that "[t]he further erosion of the real estate tax base is always a concern," but also stated:

> In regards to the exempt status of the subject, the County feels [the? 2/] property obviously serves a public need with the law enforcement and exemption should be sought under K.S.A. 79-201a Second. A number of properties in Jackson County are exempted for public service properties (i.e. fire district, city offices, etc.) and alter no Federal/Local status. Jackson County feels the property does not require the "umbrella" of Trust to qualify for exempt status and would indicate the same to State Board of Tax Appeals in any request for exemption for this nature of use.

On March 16, 1999, the Tribe responded to the comments submitted by Appellant and the County.

On December 22, 1999, the Field Representative, Horton Field Office (formerly Superintendent, Horton Agency), issued notice of his decision to take the land into trust. In the decision letter, he analyzed the acquisition under the criteria in 25 C.F.R. § 151.10. He advised the parties of their right to appeal his decision and enclosed a copy of the Tribe's March 16, 1999, letter responding to the State and County comments.

Appellant appealed to the Regional Director. On May 1, 2000, following briefing by Appellant and the Tribe, the Regional Director affirmed the Field Representative's decision. He included in his decision a further analysis of the acquisition under the criteria in 25 C.F.R. § 151.10. Appellant then appealed to the Board.

In its notice of appeal, Appellant made eleven numbered contentions: (1) Appellant and the County will lose tax revenue as a result of the trust acquisition; (2) there are no credible facts to support the finding that the Tribe provides services such as law enforcement, road and bridge construction and maintenance, fire protection, Headstart/daycare services, senior citizen meals, impact aid and related services to Royal Valley School; (3) the Regional Director failed

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2/ This word is not legible on the record copy of this letter.

to make any findings concerning the services provided by the State and failed to allow the State an opportunity to present evidence and testimony or to test the credibility and veracity of the Tribe's statements in support of its request; (4) the Indian Reorganization Act (IRA) violates the Tenth Amendment to the United States Constitution; (5) the Regional Director's decision violates the separation of powers doctrine; (6) the Regional Director's decision violates the Act for Admission of Kansas into the Union; (7) the Regional Director's decision (apparently as distinguished from the IRA) violates the Tenth Amendment and, (in a repetition of contentions 5 and 6) also violates the separation of powers doctrine and the Act for Admission of Kansas into the Union; (8) the IRA authorizes trust acquisitions only for landless Indians and only for agricultural purposes; (9) the Regional Director improperly relied in part on a proposed revision of 25 C.F.R. Part 151; (10) the Regional Director improperly relied on a rule of construction stated in Squire v. Capoeman, 351 U.S. 1 (1956); and (11) the Regional Director incorrectly stated that the Tribe was in the process of developing a cross-deputization agreement with the State and County.

In its opening brief, Appellant rearranges and expands upon some of these contentions.

The Board undertakes a further rearrangement of Appellant's arguments. Because the scope of its review differs according to whether an argument raises a legal objection to the Regional Director's decision or challenges his exercise of discretion (see, e.g., Rio Arriba, New Mexico, Board of County Comm'rs v. Acting Southwest Regional Director, 36 IBIA 14, 18 (2001)), the Board finds that it should organize Appellant's arguments on this basis.

The Board first turns to those of Appellant's arguments which raise legal issues.

Appellant contends that 25 U.S.C. § 465 is unconstitutional because it violates the Tenth Amendment to the United States Constitution and the principle of separation of powers. 3/ The Board has no authority to declare a Federal statute unconstitutional and therefore lacks jurisdiction to address this argument. E.g., Oklahoma Petroleum Marketers Assoc. v. Acting Muskogee Area Director, 35 IBIA 285, 287 (2000). The Board observes, however, that the United States Court of Appeals for the Tenth Circuit, within whose jurisdiction the land at issue here is located, has upheld the constitutionality of 25 U.S.C. § 465. United States v. Roberts, 185 F.3d 1125, 1136-37 (10th Cir. 1999), cert. denied, 120 S.Ct. 1960 (2000).

3/ Appellant appears in some places to be challenging the constitutionality of the IRA as a whole. However, its arguments are directed solely to trust acquisitions. Therefore, the Board construes Appellant's challenge as one made only to section 5 of the IRA, codified as 25 U.S.C. § 465.

Further, although Appellant contended in its notice of appeal, and again in its opening brief, that it is the Regional Director's decision, rather than the statute, which violates the principle of separation of powers, its argument is actually directed toward the statute. Therefore, the Board construes Appellant's argument as one challenging the constitutionality of the statute.

Appellant argues that the Regional Director's decision violates the Act for Admission of Kansas into the Union. 4/ It asserts broadly that the Regional Director's decision violates Appellant's sovereignty and the equal footing doctrine. However, even though there is a considerable body of case law concerning the equal footing doctrine and the admission acts for various states, 5/ Appellant does not even attempt to show how its contentions are supported by the case law. Indeed, it cites no cases at all and fails to support its contentions with any analysis whatsoever.

Appellant's bare contentions are insufficient to carry its burden of proof. Appellant has failed to show that the Regional Director's decision violates the Act for Admission of Kansas into the Union.

Appellant argues that this trust acquisition is not authorized by 25 U.S.C. § 465 because that provision authorizes trust acquisitions only for landless Indians and only for agricultural purposes. Appellant concedes, however, that the language of section 465 does not so limit the trust acquisition authority.

Most of Appellant's argument on this point is devoted to quotations from the legislative history of the IRA which, according to Appellant, show that Congress intended to limit trust acquisitions to landless Indians.

Appellant's quotations are not persuasive in this regard. More importantly, its "landless Indians" argument has been explicitly rejected by Federal courts at least four times. United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir.), cert. denied, 439 U.S. 965 (1978); City of Sault Ste. Marie v. Andrus, 532 F.Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F.Supp. 342, 345-46 (D.D.C. 1978). Appellant does not even acknowledge that these cases exist, let alone show that they were wrongly decided.

With respect to its contention that trust acquisitions may be made only for agricultural purposes, Appellant relies on even less persuasive quotations from the legislative history.

4/ Appellant does not provide a citation for this statute. It is the Act of Jan. 29, 1861, ch. 20, 12 Stat. 126.

5/ See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, ___, 119 S.Ct. 1187, 1203-1206 (1999), and cases cited therein; The Kansas Indians, 72 U.S. 737 (1867).
As the Supreme Court stated in Mille Lacs Band, the equal footing doctrine is "the constitutional principle that all States are admitted to the Union with the same attributes of sovereignty (i.e., on equal footing) as the original 13 States." 119 S.Ct. at 1204.

Nothing quoted by Appellant in any way suggests an intent on the part of Congress to require that trust acquisitions be made only for agricultural purposes.

Appellant has failed to show that the trust acquisition authority in 25 U.S.C. § 465 may be exercised only for the benefit of landless Indians or that it may be exercised only to acquire land for agricultural purposes.

In two arguments which address the same part of the Regional Director's decision, Appellant argues that the Regional Director improperly relied on a proposed revision of 25 C.F.R. Part 151 and improperly relied on a rule of construction stated in Squire v. Capoeman, supra.

Both of these matters are discussed on page 1 of the Regional Director's decision, in connection with his conclusion that the tract proposed for trust acquisition was "located adjacent and contiguous to the tribe's recognized reservation area" and was therefore required to be analyzed only under the criteria in 25 C.F.R. § 151.10 (and not the additional criteria in section 151.11 for lands located outside of and non-contiguous to a tribe's reservation). The Regional Director discussed a proposed revision of Part 151 which was published on April 12, 1999, 64 Fed. Reg. 17574. 6/ He quoted from the preamble, noting in particular that, under the proposed revision, off-reservation acquisitions would be subject to stricter scrutiny while on-reservation acquisitions would be subject to "a process and a standard which reflect a presumption in favor of acquisition of trust title." He then stated: "Further, as if it were necessary, it is well to remember that '[d]oubtful expressions are to be resolved' in favor of the Indians. Squire v. Capoeman, 351 U.S. [at] 6."

The Regional Director's reference to the proposed revision of Part 151 is puzzling. It suggests that he may have intended to apply to this acquisition the policy reflected in the proposed revision, and perhaps even the "presumption in favor of acquisition of trust title" intended for on-reservation trust acquisitions. However, under the proposed revision, the tract at issue here would not be regarded as "on-reservation." Under the proposed revision, lands contiguous to a reservation, as this tract is, would be deemed "off-reservation" and therefore subject to the more demanding standards for off-reservation acquisitions. 7/ Thus, had the

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6/ A final revision of 25 C.F.R. Part 151 was published on Jan. 16, 2001. 66 Fed. Reg. 3452. However, its effective date has been delayed until Aug. 13, 2001. 66 Fed. Reg. 19403 (Apr. 16, 2001).

7/ See 64 Fed. Reg. at 17577:

"Unlike the regulations currently in effect, the proposed regulations do not treat applications concerning land which is adjacent (contiguous) to a reservation as if the land were located on-reservation. Rather, applications concerning adjacent parcels are to be treated as off-reservation acquisitions, and will be subject to the same process and local non-Indian government consultation as are applications concerning other off-reservation lands."

Regional Director actually followed the policy reflected in the proposed regulations, he would have applied stricter standards, rather than looser ones. Yet, as Appellant's argument suggests, the Regional Director's discussion implies an intent to apply looser standards.

Appellant objects to the quotation from Squire v. Capoeman on the grounds that it is incomplete and fails to show that the Supreme Court was there discussing the interpretation of treaties. The rule of construction discussed in Squire v. Capoeman applies to the interpretation of statutes as well as the interpretation of treaties. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) and cases cited therein. In particular, it applies to the interpretation of statutes enacted for the benefit of Indians. Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976). Thus it would apply to the interpretation of 25 U.S.C. § 465.

However, the Regional Director was not called upon here to interpret 25 U.S.C. § 465, because the controlling interpretation for his purposes was the one found in 25 C.F.R. Part 151. Conceivably, he intended to apply the rule to the interpretation of Part 151. (The rule of construction has been held to apply to the interpretation of regulations. E.g., Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1332 (10th Cir. 1982).) Unfortunately, the context in which the Regional Director cited the rule makes it appear that he was using it to reinforce his reference to the proposed revision of Part 151.

In the remainder of his decision, the Regional Director analyzed the trust acquisition request under the criteria in section 151.10 of the present regulations. There is no indication in that analysis that he was applying the "presumption" discussed above. Nor is there any indication in the initial analysis made by the Field Representative that he intended to apply such a presumption. Rather, both analyses appear firmly grounded in the existing criteria.

Even so, it is conceivable that the Regional Director's analysis under the present criteria was influenced to some extent by the policy reflected in the proposed regulations (and by his apparent misunderstanding of how that policy would be applied to the trust acquisition at issue here). Therefore, the Board finds that this matter must be remanded to him for further consideration in accordance with the instructions below.

Appellant's remaining allegations challenge, for the most part, BIA's exercise of discretion. The Board's jurisdiction over BIA's exercise of discretion is limited. Rio Arriba Board of County Comm'rs, supra. Appellant's burden, with respect to these allegations, is to show that BIA did not properly exercise its discretion. Id.

In an argument consolidating arguments 2 and 3 from its notice of appeal, Appellant argues that the Regional Director lacked adequate facts to make his decision.

In this part of its brief, Appellant first argues that BIA should have conducted an evidentiary hearing at which Appellant could have presented evidence and cross-examined tribal witnesses. Appellant cites no authority in support of this contention.

There is no requirement in 25 U.S.C. § 465 or 25 C.F.R. Part 151 that evidentiary hearings be conducted for trust acquisition applications. Further, Appellant's unsupported contention is insufficient to show that BIA improperly exercised its discretion by not conducting such a hearing.

Appellant alleges that it was never given an opportunity to present evidence in support of its position. In fact, Appellant had a greater opportunity than usual to present arguments and evidence to BIA. This was so because, under the two-level decision-making procedure BIA followed in this case, Appellant had a second bite at the apple while the matter was still pending before BIA. The Board rejects Appellant's contention that it was never given an opportunity to submit evidence in support of its position.

Appellant clearly disbelieves the statements made by the Tribe as to the services the Tribe provides. The Tribe made statements concerning those services in its March 16, 1999, letter and, following challenge by Appellant, submitted affidavits from tribal employees in support of its statements. While Appellant objects to the Tribe's statements and evidence, it has not offered any evidence to refute them.

Under these circumstances, Appellant has not shown that BIA improperly exercised its discretion by relying on information provided by the Tribe.

In argument 11 in its notice of appeal, Appellant disputes the Regional Director's statement that "the tribe is in the process of developing a mutually beneficial cross-deputization agreement with the State and County." Regional Director's Decision at 3. The Regional Director made this statement in connection with his analysis under 25 C.F.R. § 151.10(f) ("jurisdictional problems and conflicts of land use which may arise"). Appellant contends: "The tribe must be developing said 'agreement' by itself, because neither [Appellant] nor Jackson County, Kansas are involved, and have in fact specifically rejected the tribe's overtures for just such an agreement." Notice of Appeal at 6.

The Tribe's submissions to BIA indicated that it had been in communication with the County concerning cross-deputizations and that it expected to enter into a cross-deputization agreement in accordance with its 1995 gaming compact with Appellant. 8/

It is apparent that Appellant and the Tribe have different opinions as to whether a cross-deputization agreement will be successfully negotiated. However, given the provision in the gaming compact and the statement of the Tribe concerning its efforts, it was reasonable for

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8/ Section 15 of the compact provides:

"Cross-Deputization Agreement. To the extent permitted by law, the Tribe and the State agree to enter into such cross-deputization agreements as may be necessary and proper to facilitate cooperation between tribal and state law enforcement personnel."

See http://www.ink.org/public/ksga/fullcompact.htm.

the Regional Director to take the possibility of a cross-deputization agreement into account in his analysis under 25 C.F.R. § 151.10(f). Appellant has not shown that the Regional Director improperly exercised his discretionary authority by doing so.

Finally, the Board reaches the first argument made in Appellant's notice of appeal--that Appellant and Jackson County will lose tax revenue as a result of the trust acquisition. On this point, Appellant and the County appear to disagree. As noted above, the County stated in its comments to BIA that it believed the property would be tax exempt under State law and, in fact, used that point to argue that trust status was not necessary to secure tax exemption for the land. In its reply brief in this appeal, Appellant explicitly disagrees with the County's statement in this regard.

Despite the County's statement to BIA, the Regional Director considered loss of tax revenue to the State and County as one factor in his analysis under 25 C.F.R. § 151.10(e). Appellant acknowledges that he did so. Appellant has not shown that the Regional Director improperly exercised his discretionary authority with respect to his consideration of the loss of tax revenue to the State and County.

Except for its argument concerning the Regional Director's reference to the proposed regulations, Appellant has failed to show error in his decision and has failed to show that he improperly exercised his discretion.

As noted above, the Board has found that this matter must be remanded for further consideration. Upon remand, the Regional Director shall re-analyze this trust acquisition under the criteria in the present 25 C.F.R. § 151.10 without taking into consideration any provisions in the proposed revision of Part 151 or any provisions in the final, but not yet effective, revision of Part 151. He may confirm and adopt the analysis in his May 1, 2000, decision to the extent that he finds that the analysis was not influenced by the proposed regulations or finds that he would reach the same conclusion without consideration of the proposed regulations. He is not required to solicit further comments from any party although he may do so if he believes it would assist him in his re-analysis. If he solicits further comments from any party, he shall allow responses by other parties. He shall issue a new decision incorporating his re-analysis.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's May 1, 2000, decision is vacated, and this matter is remanded to him for further consideration.

Anita Vogt
Administrative Judge

Kathryn A. Lynn
Chief Administrative Judge